JALLCON (M) SDN BHD

v.

NIKKEN METAL (M) SDN BHD (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-690-98]
19 FEBRUARY 2001

CIVIL PROCEDURE: *Summary judgment - Counterclaim - Sub-contractor's claim for balance of payment for work done - Whether sub-contractor fulfilled its part of the bargain under sub-contract - Whether there was a defence to the counterclaim - Rules of the High Court 1980, O. 14 r. 5(1)*

This was the plaintiff's appeal against the decision of the senior assistant registrar ('SAR') allowing the defendant's application grounded on its counterclaim for summary judgment against the plaintiff. The defendant was the sub-contractor of the plaintiff to supply and install certain goods in relation to a housing project. Progressive payments were made by the plaintiff to the defendant. The plaintiff then ceased payment which led to the defendant's claim for the balance outstanding in the sum of RM474,580.15. It was the stand of the defendant that it had completed the sub-contract work on 7 October 1997 in accordance with a master work programme ('MWP') agreed between the parties concerned.

Held:

[1] The plaintiff had written three letters expressing serious concerns about the defendant's work performance. The defendant had not remained idle. It responded by way of an affidavit and was carefully worded. The plaintiff did not respond to the facts as deposed by the defendant and that failure must be construed against the plaintiff. The plaintiff's three letters were all written before the defendant had completed the sub-contract work on 7 October 1997. Thus the sting of the said letters were clearly minimal and of no consequence at all.

[2] The defendant had fulfilled its obligations under the sub-contract by completing the work in time. The plaintiff had made progressive payments and there was no explanation forthcoming from the plaintiff for the sudden stoppage thereafter. The plaintiff failed to pay the outstanding sum of RM474,580.15. It was a deliberate act of refusal.

[3] The plaintiff did not raise triable issues and did not challenge the contents of the MWP. Since the plaintiff had no defence to the counterclaim, the defendant was entitled to apply as it did for summary judgment against the plaintiff pursuant to O. 14 r. 5(1) of the Rules of the High Court 1980.

[Appeal dismissed.]

Case(s) referred to:

Addison v. Brown [1954] 1 WLR 779 ***(refd)***
Aktieselskabet Olivebank v. Dansk Svolsyre Fabrik [1919] 2 KB 162 ***(refd)***
Amon v. Bobbett [1889] 22 QBD 543 ***(refd)***
Ang Swee Chuan v. Lim Teng Huan [1988] 3 MLJ 471 ***(refd)***
Ashmore v. Corporation of Lloyds (No 2) [1992] 2 Lloyd's Rep 620 ***(refd)***
Banco de Portugal v. Waterlow & Sons Ltd [1932] AC 452 ***(refd)***
British School of Motoring Ltd v. Simms [1971] 1 All ER 317 ***(refd)***
Jallcon (M) Sdn Bhd v. Nikken Metal Industries Sdn Bhd [2000] 6 CLJ 485 ***(refd)***
Johnstone v. Bloomsbury Health Authority [1991] 2 All ER 293 ***(refd)***
Lister v. Romford Ice & Cold Storage Co [1957] AC 555 ***(refd)***
Luxor (Eastbourne) Ltd v. Cooper [1941] AC 108 ***(refd)***
McGowan v. Middleton [1883] 11 QBD 464 and Amon v. Bobbett [1889] 22 QBD 543 ***(refd)***
Miles v. Bull [1968] 3 All ER 632 ***(refd)***
Ng Hong Chai v. Teok Ah Kow [2000] 5 CLJ 175 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 ***(refd)***
Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 MLJ 157 ***(refd)***
R v. Paddington and St Marylebone Rent Tribunal [1947] KB 984 ***(refd)***
Reigate v. Union Manufacturing Co [1981] 1 KB 592 ***(refd)***
Shell UK Ltd v. Lostock Garage Ltd [1976] 1 WLR 1187 ***(refd)***
Shirlaw v. Southern Foundries (1926) Ltd [1939] 2 KB 206 ***(refd)***
Silverman v. Imperial London Hotels Ltd [1927] 137 LT 57 ***(refd)***
TAC Construction & Trading v. Bennes Engineering Bhd [1999] 2 CLJ 117 ***(refd)***
Tappenden v. Artus [1964] 2 QB 185 ***(refd)***
Terkol Rederierne v. Petroles Brasilero SA [1985] 1 Lloyd's Rep 395 ***(refd)***
The Moorcock [1889] 14 PD 64 ***(refd)***
Trollope and Colls Ltd v. North West Metropolitan Regional Hospital Board [1973] 2 All ER 260 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218
Rules of the High Court 1980, O. 14 r. 5(1), O. 15 r. 2(1), (3)
Brunei High Court (Civil Procedure) Rules, O. 20 r. 3

Other source(s) referred to:

The Law of Contract, Treitel

For the plaintiff - David Lingam; M/s David Lingam & Co
For the defendant - CS Lim; M/s Syarikat Lek Yan

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Malik Ishak J:

Enclosure 36 – The Order 14 Application And The Facts Thereto

This was the defendant's application grounded on its counterclaim wherein the defendant sought for judgment against the plaintiff on that part of the counterclaim which came up to RM474,580.15 together with costs to be borne by the plaintiff. The defendant was a sub-contractor to the plaintiff and the plaintiff was the main contractor for the UEP Subang Jaya, phase 156 project which was for the construction of 42 units of double storey bungalow houses at phase 61C/2 and 26 units of double storey semi-detached houses at phase 61D/2 at Lot 20 and it included external and internal works. As a sub-contractor, the defendant contracted to supply and instal PE-F polyester powder finish "RICCINA" aluminium windows and doors complete with all the necessary ironmongeries, fittings and glazings (hereinafter referred to as the "said goods"). The value of the sub-contract works came up to RM973,307.42.

The date of the commencement of the sub-contract was 2 December 1996 and it was scheduled to complete by 2 June 1997 (see exh. "WSK1 of encl. 35). Sometime in the month of May 1997, the plaintiff furnished to the defendant a copy of the master work programme ("MWP") as seen in exh. "WSK2" of encl. 35. According to MWP, the defendant's contractual duty to supply and install the said goods was programmed at items 27 and 29 and it clearly showed that the completion of the sub-contract was extended to the month of October 1997. It was the stand of the defendant that it had completed the contractual works on 7 October 1997 in accordance with the MWP as furnished by the plaintiff and this was amply supported by a letter from the defendant addressed to the plaintiff dated 7 October 1997. That very letter was exhibited as "WSK3" of encl. 35 and it was worded as follows:

> RE: PROPOSED HOUSING SCHEME AT SUBANG JAYA FOR SIME UEP (FASA 61C/2 & 61D/2)
>
> With reference to the above project.
>
> Please be informed that, we had completed installing all the aluminium window(s) and door(s) for the above project on October 7, 1997.
>
> Thank you.

It must be emphasised that the plaintiff did not deny in para. 3.3 of their "reply and defence to the counterclaim" dated 18 June 1999 as seen in encl. 33 that they had furnished the MWP to the defendant. This was a damming piece of evidence that should be construed adversely against the plaintiff.

Progressive payments were made by the plaintiff between the period ranging from 2 April 1997 to 21 November 1997. The plaintiff made the first payment on 2 April 1997 and the total payment which the plaintiff effected came up to a figure of RM449,000. All the relevant record and payment vouchers of the plaintiff have been exhibited and marked as exh. "WSK4" of encl. 35 particularly at p. 20 to p. 33 thereto. These payment vouchers showed that the plaintiff had partially paid the defendant under the sub-contract. As alluded to earlier the value of the sub-contract works was RM973,307.42 but upon the instruction of the plaintiff the total works which the defendant had to perform was varied to RM972,189.63. The plaintiff's instruction can be seen in its letter dated 26 December 1996 which was exhibited as exh. "WSK5" in encl. 35 particularly at p. 44 and p. 45 thereto. The variation of the works can be seen in various documents entitled "progress claim no: 6" and these can be seen collectively in exh. "WSK5" of encl. 35 at p. 36 to p. 43 thereto. All these make for interesting reading.

The plaintiff ceased making its payment since 21 November 1997 and the defendant wasted no time at all and proceeded to issue a letter of demand to the plaintiff for the balance which was still due and owing, namely, the sum of RM474,580.15. The defendant sent two letters of demand. One, dated 3 August 1998 signed by Wong Swee Kong. The other dated 26 November 1997 which was signed by Ida Lee. Both these two letters of demand were worded in the same way – word by word, and for this exercise I will reproduce the letter of demand signed by Wong Swee Kong as seen in exh. "WSK5" of encl. 35 at p. 34 and it was worded in this way:

> Project: Proposed Housing Scheme at Subang Jaya for Sime UEP (Fasa 61C/2 & 61D/2)
>
> We are pleased to submit herewith our 8th Progress Claim for the abovementioned project for your kind attention as follows:

Total Work done	RM 972,189.63
Less: 5% Limit of retention	RM 48,609.48
	RM 923,580.15
Less: Payment received	RM 449,000.00
Amount Due	RM 474,580.15

Further details are as per the attached sheet.

Thank you.

To play safe, the defendant instructed its solicitors to issue a letter of demand to the plaintiff. This was done. The letter of demand emanating from the defendant's solicitors was dated 14 September 1998 and this can be seen in exh. "WSK6" of encl. 35 and it was worded in this way:

RE: YOUR OUTSTANDING DEBT OF RM474,580.15
DUE & OWING TO M/S NIKKEN METAL INDUSTRIES SDN BHD

We act for M/s Nikken Metal Industries Sdn Bhd.

We are instructed by our clients that there is a sum of RM474,580.15 due and owing by you to our clients for goods sold and delivered to you at your request, the particulars of which you are well aware of.

Despite repeated demands, you chose to ignore, neglect and/or refuse to pay and settle the said sum of RM474,580.15 until to date.

TAKE NOTICE that we have our clients instructions to demand from you, which we hereby do that unless the said sum of RM474,580.15 is paid to us as Solicitors within **SEVEN (7) DAYS** from the date of the receipt of this letter by yourselves, we have instructions to commence legal proceedings against you for the recovery thereof, in which event you are to (be) further liable for an additional sum in respect of interest, damages (if any) and costs incurred thereafter.

The letter of demand emphasised the amount that was due and outstanding to be RM474,580.15 and this sum was not challenged by the plaintiff at all. Sad to say the plaintiff either refused to pay or failed to pay the said amount.

On these simple and straightforward facts, the learned senior assistant registrar ("SAR") in the person of Madam Hajjah Wan Azizon binti Ahmad allowed the defendant's application for summary judgment in encl. 36 with costs under O. 14 of the Rules of the High Court 1980 ("RHC"). The learned SAR also ordered a stay of execution pending the disposal of the plaintiff's claim. Aggrieved by the decision of the learned SAR, the plaintiff filed an appeal to the judge in chambers as seen in encl. 43.

At the outset, it is germane to mention that the defendant had instructed its solicitors to issue a statutory demand against the plaintiff pursuant to s. 218 of the Companies Act 1965 ("218 notice") on 29 September 1998. But the 218 notice was eventually withdrawn by the defendant when the plaintiff filed its writ and statement of claim on 27 October 1998 as reflected in encl. 1.

It is germane to mention that this judgment was written as an offshoot of another judgment by the same name, namely, *Jallcon (M) Sdn Bhd v. Nikken Metal Industries Sdn Bhd* [2000] 6 CLJ 485. I am sure that more judgments bearing the same name will appear in the near future.

The Law And The Assessment Of The Facts

Order 14 r. 5(1) of the RHC states as follows:

> Where a defendant to an action begun by writ has served a counterclaim on the plaintiff, then, subject, to paragraph (3), the defendant may, on the ground that the plaintiff has no defence to a claim made in the counterclaim, or to a particular part of such a claim, apply to the Court for judgment against the plaintiff on that claim or part.

and it puts the counterclaim at par with the plaintiff's claim. The defendant is given the same right to apply for summary judgment under O. 14 of the RHC against the plaintiff in regard to the defendant's claim or part of the defendant's claim as incorporated in the counterclaim just like the plaintiff has in relation to the plaintiff's claim as incorporated in the writ and the statement of claim. In *Ng Hong Chai v. Teok Ah Kow* [2000] 5 CLJ 175, at p. 188 to p. 189, I had occasion to say something about a counterclaim and this was what I said:

> Order 14 rule 5 (1) of the RHC gives an unfettered right to the respondent to apply for summary judgment on the counterclaim. The counterclaim is an independent action. It gives the respondent a similar right to apply for summary judgment under Order 14 against the appellant.

According to O. 15 r. 2(1) of the RHC, a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and when the defendant does so he must add the counterclaim to his defence. A counterclaim is not a set-off. A counterclaim is in fact a cross-action which by itself has a separate and independent standing. It is because of this that the counterclaim may be continued indefinitely even though the main claim of the plaintiff has come to its final conclusion (see O. 15 r. 2(3) of the RHC and two old vintage cases, namely, *McGowan v. Middleton* [1883] 11 QBD 464 and *Amon v. Bobbett* [1889] 22 QBD 543 at p. 548). A counterclaim can also be described as a separate action which commenced on the same date as the plaintiff's claim where the counterclaim is being pleaded.

A good exposition of the meaning of a counterclaim has been lucidly advanced by Salleh Abas LP (as he then was) in the case of *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 MLJ 157, 161:

> A counterclaim on the other hand is also a cross-claim which a defendant has against a plaintiff but in respect of which the defendant can bring a separate action against the plaintiff if he wishes to do so. Thus, to all intents and purposes a counterclaim is a separate and independent action by the defendant, which the law allows to be joined to the plaintiff's action in order to avoid multiplicity or circuity of suits. Like set-offs, a counterclaim is also the creation of Statutes. At common law the court has no power to allow an action by a plaintiff to be met by a cross-claim of the defendant against the plaintiff. The court simply left the defendant to commence a separate action. It was only by virtue of the Supreme Court of Judicature Act, 1873, section 24 (3) that enabled the defendant's counterclaim to be added to the plaintiff's suit.
>
> In so far as our law is concerned, a counterclaim is governed by the provisions of Order 15 rule 2 which we have already set out earlier.
>
> It is, therefore clear that a counterclaim is wider than a defence of set-off and that whilst the former is a separate action by defendant against a plaintiff, the latter is essentially a defence, although a defendant is entitled to add it as counterclaim. Being a defence to a plaintiff's action, the matter sought to be set-off must essentially be connected with or form part of the matter upon which the plaintiff's action is founded.

Across the South China Sea, in the Kingdom of Brunei, Roberts CJ in the case of *Ang Swee Chuan v. Lim Teng Huan* [1988] 3 MLJ 471, 472 said, after observing that the registrar's attention was not drawn to O. 20 r. 3 of the Brunei High Court (Civil Procedure) Rules:

> This rule means that, where there is a counterclaim, it is, for the purposes of Order 14, to be considered in the same manner as a claim under that Order, so that a final judgment may be entered thereunder on a counterclaim as it can on a claim. Thus Order 14 is available in all respects to a defendant with a counterclaim as it is to a plaintiff.

According to Megarry J in *Miles v. Bull* [1968] 3 All ER 632, 638, the:

> R.S.C., Order 14, is for the plain and straight-forward, not for the devious and crafty.

and the crucial question to pose would be whether the defendant's application in encl. 36 for summary judgment was plain and straight forward? This was a case where the defendant had succeeded in proving that the sub-contract works had been completed on 7 October 1997 according to the MWP guideline and, to add insult to injury, the plaintiff had even advanced payments for some

of the sub-contract works that had been completed. By furnishing the MWP, the plaintiff had in fact fulfilled its obligations under cll. 3 and 4(b) of the sub-contract by making the necessary variations for the completion of the works. Clause 3 of the sub-contract vested the power to the plaintiff to instruct the defendant and it was worded in this way:

Variation

> The contractor (referring to the plaintiff) may issue to the sub-contractor (referring to the defendant) instruction in relation (to) the sub-contract works, and the sub-contractor (referring to the defendant) shall forthwith comply with and carry out the same accordingly.

In the same vein, cl. 4(b) of the sub-contract allowed the plaintiff to extend the period of completion of the sub-contract works and it was worded in a very wide fashion, so wide that the plaintiff's position can be described as nothing less than supreme:

4. Completion

> (b) The sub-contractor (referring to the defendant) shall complete the sub-contract works (and each section thereof) within the period specified in Part II of the Appendix to this sub-contract or within such extended period(s) as may be granted.

The plaintiff did not deny that it had issued the MWP to the defendant. In fact, the MWP had been sanctioned by the architect that was appointed by the plaintiff. The following conduct of the plaintiff must be taken into account in adjudicating encl. 43:

(1) that the plaintiff did not challenge the contents of the MWP;

(2) that the plaintiff did not contest as to the date of giving the MWP to the defendant; and

(3) that the plaintiff never denied in their affidavit in regard to the details as set forth in the MWP.

In my judgment, the MWP clearly and undeniably showed the progression of the construction works in UEP Subang Jaya. The defendant's focal point of attention would be at items 27 and 29. The "dark" bar parallel to items 27 and 29 clearly indicated that the defendant was able to supply and install the said goods in the middle of the month of March 1997 and it was scheduled to complete in the early part or in the middle of the month of October 1997. All these facts were not challenged at all by the plaintiff.

At this juncture, a pertinent question should be posed. And that pertinent question may be worded in this way: how could the defendant commence installation of the said goods without the "mock-up" of the building? It must be recalled that the project was concerned with building different types of houses in the UEP Subang Jaya enclave. Upon perusal of the MWP, it would be apparent that the defendant can only begin to install the said goods at items 27 and 29 after all the preliminary works (item 1) together with the piling (item 4) and the construction of the retaining/party walls (item 13) have been duly erected. According to the MWP, works on item 1 commenced by the end of August 1996, while the works on item 4 proceeded in the early part of September 1996. Item 13 got off the ground in the middle of January 1997. It was next to impossible for the defendant to install the aluminium windows and doors complete with all the necessary ironmongeries, fittings and glazings when the preliminary works and the retaining/party walls have yet to be done. It was crystal clear by looking at the MWP that the defendant was only able to carry out its sub-contract works for items 27 and 29 sometime in the middle of March 1997.

It was argued on behalf of the plaintiff that there were no provisions in the sub-contract to show that the tenure and completion of the works were dependent or in any way governed by the MWP or upon the availability of the mock-up unit. It was submitted that the sub-contract was totally silent on these two issues. With respect, the MWP was brought into the picture by the plaintiff pursuant to cll. 3 and 4(b) of the sub-contract. The sub-contract categorically stated that the defendant was to supply and instal the said goods and how could the defendant instal the said goods if the "mock up" of the building was not there in the first place. Implicit in the sub-contract was the requirement that the "mock up" of the building should be ready before installation of the said goods. In any class of contract or sub-contract, the court is empowered to imply a term in an attempt to give effect to the transaction between the parties. Implying a term is also one of the ways to repair an intrinsic failure of expression. The sub-contract at hand is a victim of clumsy draftsmanship. Such omission must be remedied and if not remedied it would negative the purpose of the sub-contract itself. It is to give "business efficacy" to the sub-contract that I am prepared to read into the sub-contract to the effect that before the defendant supply and instal the said goods, the mock up of the building must be ready. Not only that, the preliminary works together with the retaining/party walls must also be ready. A classic example would be the famous case known the world over as *The Moorcock* [1889] 14 PD 64, [1886-90] All ER Rep 530 CA. In that case the defendants had contracted to allow the plaintiffs to load and unload at the defendants' wharf on the River Thames.

It was known to both parties that at low tide any vessel at the wharf would be grounded but there was no express provision governing this in the contract. The plaintiffs' ship moored alongside the wharf, settled on the ground and was extensively damaged because of the condition of the river bed. The defendants had taken no steps to ascertain the condition of the river bed. The plaintiffs brought an action for damages in respect of the damage done to the ship. The Court of Appeal implied a term whereby the defendants warranted that they had taken reasonable care to see that the berth was safe. It was held that the defendants were in breach of such implied term. Bowen LJ in the course of his judgment had this to say:

> The question which arises in this case is whether, when a contract is made to let the use of this jetty to a ship which can only use it, as is known to both parties, by her taking the ground, there is any implied warranty on the part of the wharfingers, and if so what is the extent of that warranty.
>
> An implied warranty, or as it is called a covenant in law, as distinguished from an express contract or express warranty, really is in every instance founded on the presumed intention of the parties and upon reason. It is the implication which the law draws from what must obviously have been the intention of the parties, an implication which the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either of the parties.

In the later part of his judgment, Bowen LJ said:

> It may well be said that the law will not imply that the defendants, who had no control of the place, ought to have taken reasonable care to make the berth good, but it does not follow that they are relieved from all responsibility, a responsibility which depends not merely on the control of the place, which is one element as to which the law implies a duty, but on other circumstances. The defendants are on the spot. They must know the jetty cannot be safely used unless reasonable care is taken. No one can tell whether reasonable safety has been secured except themselves, and I think that, if they let out their jetty for use, they at all events imply that they have taken reasonable care to see that the berth, which is the essential part of the use of the jetty, is safe, and, if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so ...

It is a correct assertion of the law to say that there are two categories of terms implied by the courts:

(1) A term can be implied if it is a necessary outcome for this type of contract. The learned author by the name of Treitel in his book entitled: "*The Law of Contract*", classifies this as "terms implied in law".

(2) A term can be implied on the basis of a "one-off" situation simply because it is necessary to give business efficacy to the contract. Again the learned author by the name of Treitel in his book entitled: "*The Law of Contract*", refers this method as "terms implied in fact".

In order to construe the contract so that the sting of its business efficacy can be felt would entirely be dependent on what the parties must have intended. In *Reigate v. Union Manufacturing Co* [1981] 1 KB 592, Scrutton LJ succinctly said at p. 605:

> A term can only be implied if it is necessary in the business sense to give efficacy to the contract, that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case,' they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear'.

In other words, where there is an apparently complete bargain between the two parties, the courts are ever willing to be adventurous by adding a term on the ground that without it the contract will not work at all. It is a question of imputation. An imputation is only to be made when it becomes necessary to imply a term in the contract in order to give efficacy to that contract and make it a workable agreement in such a manner as the parties would clearly have done if they had vigorously applied their mind to the contingency which has arisen. According to Lord Tucker in *Lister v. Romford Ice & Cold Storage Co* [1957] AC 555 these situations would be considered as the "officious bystander" type of cases. In such a situation, a term is not to be implied on the ground that it would be reasonable but rather when it is necessary and that term can easily be formulated with sufficient degree of precision. A case in point would be the case of *Johnstone v. Bloomsbury Health Authority* [1991] 2 All ER 293 CA. That was a case where the plaintiff, a junior hospital doctor, contracted to work for 40 hours a week for the health authority. It was an express term of the contract that the doctor would also be available on call for up to an average of a further 48 hours a week. The doctor claimed that the contract was onerous and that he should not be required to work in excess of 72 hours a week because excessive work would damage his health and this meant that the health authority would be in breach of their implied duty to take reasonable care not to injure his health. The majority of the Court of Appeal (Leggatt LJ dissenting) held that the express term did not preclude the implication by law of the suggested implied term because the health authority had a discretion over how many hours on call were required and

they were not bound to call him for the full 48 hours. The discretion, according to the majority view, had to be exercised so as not to foreseeably injure the doctor's health.

The "officious bystander" test that appeared in the judgment of Scrutton LJ in *Reigate v. Union Manufacturing Co (supra)* had its origin in the case of *Shirlaw v. Southern Foundries* (1926) Ltd [1939] 2 KB 206, 207 where Mc Kinnon LJ explained it in this way:

> If I may quote from an essay which I wrote some years ago, I then said: '*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'
>
> At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong.

But the courts must always be careful. In its endeavour to imply terms in a written contract, the courts must always ensure that they do not re-draft the contract for and on behalf of the parties. Borrowing the words of Lord Wright in *Luxor (Eastbourne) Ltd v. Cooper* [1941] AC 108, 137 certain terms can only be implied in the contract if those terms are found to be "necessary to give the transaction such business efficacy as the parties must have intended". Lord Pearson once said in *Trollope and Colls Ltd v. North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260 at 268, [1973] 1 WLR 601 at 609, which must surely apply to the factual matrix of the present appeal, that:

> An unexpected term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.

In the context of the present appeal, the sub-contract was poorly drafted. How could the defendant supply and install the said goods when the retaining/party walls of the houses were not ready to be fitted with the said goods? It goes without saying that in order to give business efficacy to the sub-contract, the retaining/party walls of the houses must be ready before the said goods could be installed by the defendant. The defendant could only proceed to install the aluminium windows and doors complete with all the necessary ironmongeries, fittings and glazings to the houses in the UEP Subang Jaya project when:

(1) the "mock up" of the building;

(2) the preliminary works; and

(3) the retaining/party walls,

have been completed. These implied terms must be incorporated in the sub-contract in order to give it business efficacy. This was my judgment and I so hold accordingly.

The principle as propounded by *The Moorcock* has been vigorously implied in many instances and it would be ideal to list those cases where this sound principle has been invoked:

(1) it was read by way of an implication in a contract for a Turkish bath that the couches that were installed for reclining purposes would be free from vermin (*Silverman v. Imperial London Hotels Ltd* [1927] 137 LT 57);

(2) it was invoked in construing a charterparty where the court by implication said that the charterer would not order the ship to proceed to a port where access was practically impossible (*Aktieselskabet Olivebank v. Dansk Svolsyre Fabrik* [1919] 2 KB 162);

(3) it was incorporated into a contract of bailment so that the bailee was authorised to do all things reasonable in relation to the goods (*Tappenden v. Artus* [1964] 2 QB 185);

(4) it was applied in relation to a contract for the printing of banknotes where it was implied that the plates should not fall into the hands of unauthorised personnel (*Banco de Portugal v. Waterlow & Sons Ltd* [1932] AC 452);

(5) it was imputed into a school contract where the father of a boy was required not to unreasonably withheld his consent to pay the school bills (*Addison v. Brown* [1954] 1 WLR 779); and

(6) it was imputed into a contract for driving lessons where the vehicle that was provided must be covered by an insurance policy (*British School of Motoring Ltd v. Simms* [1971] 1 All ER 317).

The list of cases where *The Moorcock* principle applied can go on ad infinitum. The present appeal would definitely come within that list. The terms to be implied to the sub-contract in the present appeal as alluded to above were certainly capable of being formulated with sufficient clarity and precision (*Shell UK Ltd v. Lostock Garage Lt*d [1976] 1 WLR 1187, 1197, 1201;

R v. Paddington and St Marylebone Rent Tribunal [1947] KB 984, 990; *Lister v. Romford Ice and Cold Storage Co Ltd* [1957] AC 555, 574; *Terkol Rederierne v. Petroles Brasilero SA* [1985] 1 Lloyd's Rep 395, 401; and *Ashmore v. Corporation of Lloyds (No 2)* [1992] 2 Lloyd's Rep 620, 628). This was my judgment and I so hold accordingly.

Next, my attention was drawn to three letters written by the plaintiff and these letters can be seen in exhs. "TTH 1", "TTH 2" and "TTH 3" of encl. 40.

I will first proceed to examine the letter in exh. "TTH2" of encl. 40. That letter was addressed to the defendant and it was dated 8 January 1997. In this letter the plaintiff, *inter alia*, expressed serious concerns about the work performance of the defendant and that after several reminders and advice the defendant had not complied with the requirements as stipulated by the plaintiff. It was argued that the letter marked as "TTH 2" of encl. 40 showed that the defendant had not commenced its work in compliance with the sub-contract and that just after a month of the commencement of the sub-contract, the plaintiff was already expressing its concern about the defendant's ability to perform under the sub-contract. That letter was not happily worded and it was drafted in atrocious English and I do not propose to reproduce it in this judgment.

Now, it is time to examine the letter marked as exh. "TTH1" of encl. 40. That letter was dated 5 May 1997 and it was addressed to the defendant. From the tenor of this letter, it was abundantly clear that when this letter was written the defendant had already been supplied with the MWP. That letter showed that the defendant's works were way behind time and it was obvious that there was delay on the part of the defendant and that the plaintiff would retain a certain percentage of the money that was meant for the defendant because of that delay. In short, the plaintiff was not happy with the performance of the defendant.

The letter marked as exh. "TTH3" of encl. 40 echoed the same sentiments. The letter was addressed to the defendant and it was dated 10 May 1997. In that letter, the plaintiff alleged that the defendant was behind schedule. The delay was said to have affected other works as well. That letter too conveyed the message that the workmanship as shown by the defendant was below par. It was said that the defendant's workmanship was poor and the defendant was requested to rectify the defective works. That letter emphasised the need for the defendant to improve not only its performance but also its workmanship.

The defendant did not remain idle. It responded by way of an affidavit in encl. 41 to the letters marked as exhs. "TTH1", "TTH2" and "TTH3" of encl. 40. Paragraphs 7(i), 7(ii). 7(iii) 7(iv), 7(v), 7(vi) and 7(vii) of encl. 41

were replies that were carefully worded. All the three letters – referring to exhs. "TTH1", "TTH2" and "TTH3" of encl. 40, were written by the plaintiff while the sub-contract was still subsisting. It must be emphasised that the plaintiff did not respond to the facts as deposed by the defendant in encl. 41 and that failure must be construed against the plaintiff (*Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609). The defendant had fulfilled its obligations under the sub-contract by completing the works on 7 October 1997 as alluded to in the early part of this judgment. There were progressive payments effected by the plaintiff and the defendant received those payments. In the beginning of the month of April 1997, the plaintiff started to make progressive payments and such payments continued until 21 November 1997. The payment vouchers and official receipts evidencing those payments have been exhibited collectively in an exhibit marked as "WSK 4" of encl. 35 at p. 20 to p. 33 thereof. If the defendant had really delayed in their sub-contract works, why did the plaintiff make those payments in April 1997 and continued doing so after 6 October 1997? Somehow the plaintiff had stopped making payment after 21 November 1997 and there was no explanation forthcoming from the plaintiff for that sudden stoppage. During and between the period of 6 May 1997 to 7 October 1997, the plaintiff did not complain of any delay. The fact of the matter was this. That upon receipt of the MWP from the plaintiff sometime in the month of May 1997, the defendant expeditiously despatched its workers to install the said goods in accordance with the MWP and works were completed in time. The plaintiff then made progressive payments to the defendant in accordance with the progress of the works that were achieved by the defendant. Progressive payments were made from time to time, stage by stage. But the plaintiff failed to pay the outstanding sum of RM474,580.15 and it was a deliberate act of refusal.

The defendant had performed its part of the bargain under the sub-contract. The said goods had been installed within the extended time frame and the defendant was therefore entitled to the counterclaim of RM474,580.15. It was so plain and obvious. I have set out in extenso the law of summary judgment pursuant to an O. 14 application in *TAC Construction & Trading v. Bennes Engineering Bhd* [1999] 2 CLJ 117 and I must now refer to them. At p. 122 to p. 124 of the report of *TAC Construction (supra)* this was what I said:

> The law journals are replete with authorities on summary judgments. Suffice for this exercise that reference to some of them are made here. Thus, in an O.14 application the defendant need only raise one triable issue acceptable to the court to enable him to defend the suit (*Amanah Merchant Bank v. Lim Tow Seng & Ors* [1993] 2 CLJ 635, [1993] 2 MLJ 241). It is said that an O. 14 application cannot be granted where the defence raises a plausible dispute

(*Avel Consultant Sdn Bhd & Anor v. Mohamed Zain Yusof & Ors* [1985] 2 CLJ 11, [1985] 2 MLJ 209). But where the facts are clear and undisputed and, the only issue raised is a question of law, it is proper that it be dealt with in an O. 14 application (*American Express Sdn Bhd v. Dato Wong Kee Tat & Ors* [1990] 1 CLJ 17; [1990] 1 MLJ 91). It is now trite law that an O. 14 application is to enable a plaintiff to obtain a summary judgment without trial provided:

(1) the plaintiff can prove his claim clearly; and

(2) the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried.

The judge must not only be satisfied that there is no defence but must also be satisfied that there is no fairly arguable point to be argued on behalf of the defendant and having so satisfied himself on these points, it is the judge's duty to give judgment to the plaintiff. I am of the considered view that there would be a fairly arguable point to be argued if the defence can raise serious questions of law or fact to resist the plaintiff's claim or it is apparent to the court, though the defence is not able to pinpoint any precise issue or question in dispute which ought to be tried, that for some reason there ought to be a trial. Mohamed Dzaiddin J (now FCJ) in *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali bin Ibrahim* [1985] 2 MLJ 225, had this to say of summary judgment at p. 226 of the report:

> The issue here is whether or not there is a triable defence. This simply means that it is for the defendant to show on merits, he has a good defence to the claim, or that a difficult point of law is involved, or the dispute is as to the fact which is to be tried or any other circumstances showing reasonable grounds of a *bona fide* defence (See: *The Supreme Court Practice* 1985 Vol. 1 - 'Defence showing cause' at p. 137).

Further down the same page of the same judgment, his Lordship Mohamed Dzaiddin J (now FCJ) said:

> However, in my opinion, this is essentially a case where the triability of the issue depends upon evidence as opposed to law. The facts and circumstances as deposed and found in the affidavits filed therein are sufficient to settle the issue. Here I would adopt the statement in the judgment of Ackner L.J. in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Rep. 23 to the following effect:
>
> It is of course trite law that Order 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, *ipso facto*, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendant's having a real or *bona fide* defence.

> Thus, from the facts and circumstances of the case as a whole, I am satisfied that the Defendant has failed to show a *bona fide* defence to the claim. Therefore, I make an order in terms of Prayers 1, 3 and 4 of this application.

The law of summary judgment was crystallized in fine legal language by that brilliant judge, Mohamed Azmi SCJ, when his Lordship wrote the majority judgment of the Supreme Court in *Bank Negara Malaysia v. Mohd. Ismail & Ors* [1992] 1 MLJ 400 SC. In that case his Lordship in refined words said at p. 408 of the report:

> In our view, basic to the application of all those legal propositions, is the requirement under Order 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 had this to say at p. 217:
>
> > Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

Although Lord Diplock was dealing with an application for removal of caveat in the particular case, we are of the view that the principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.

Under an Order 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the same issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an Order 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under Order 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (See *Cow v. Casey* [1949] 1 All ER 197 and *European Asian Bank AG v. Punjab & Sind Bank* [1983] 2 All ER 508 at page 516).
>
> With these authorities in mind, I will now proceed to examine the summary judgment application in encl. 7.

The facts in *TAC Construction (supra)* may be stated as follows. In that case the plaintiff supplied materials and performed construction works for the defendant based on certain terms included in a quotation. The quotation was sent to the defendant and to signify receipt and acknowledgment, the defendant's project manager placed his signature on that quotation. The defendant paid to the plaintiff certain sums of money but there was still an outstanding balance owing to the plaintiff. By reason of the defendant's failure to pay the said outstanding balance despite numerous reminders and a notice of demand, the plaintiff instituted an action claiming the balance due to it which came up to RM325,229.16. The plaintiff then applied for summary judgment pursuant to O. 14 of the RHC. The SAR entered judgment against the defendant and it was against this summary judgment that the defendant appealed.

Certain passages in the judgment of *TAC Construction* were referred to and emphasis were placed on them. For starters, reference was made to p. 124 of the report where the court after referring to the relevant affidavits and the exhibits thereto said:

> As a sub-contractor, the plaintiff entered into a contract with the defendant based on the terms as reflected in the quotation as seen in exh. "TAC 2" of encl. 6. That quotation showed the amount of RM145,000 that had been paid to the plaintiff and since the whole case revolved on this quotation it is necessary to set out that quotation in full with the annexures thereto.

At p. 142 of the report, the court concluded the matter when it said:

> In my judgment all the progress and final claims showed that the parties have 'finished reaching an agreement' and the only thing left for the plaintiff to do was to collect the payments thereto.

Continuing at p. 147 of the report, the court summed up the matter in these fine words:

> This was a simple and straightforward case of a contract by way of a quotation between the plaintiff and the defendant. The plaintiff had supplied materials and performed works for the defendant and all the works have been completed. The plaintiff was entitled to be paid according to the progress and final claims. Five payments were effected and the plaintiff expected to be paid for the balance.

Finally, at p. 148 to p. 149 of the report, the court said:

> All the preliminary requirements of the summary judgment application have been complied with. At the end of the day, the defendant failed to show a triable issue and, consequently, the appeal in encl. 14 must be dismissed with costs. In *Punca Klasik Sdn Bhd v. Seok Kim Leow* [1996] 5 MLJ 241, 259, I did say the following and they must surely apply to the factual matrix of the present case:
>
> > Seah F.J. (as he then was) in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 MLJ 300, FC at page 301, laid down the requirements for an Order 14 application in these words:
> >
> > > For the purpose of an application under Order 14 the preliminary requirements are:
> > >
> > > (i) the defendant must have entered an appearance;
> > >
> > > (ii) the statement of claim must have been served on the defendant; and
> > >
> > > (iii) the affidavit in support of the application must comply with the requirements of Order 14, rule 2.
> >
> > All these three requirements have been fulfilled in the present case and the onus was therefore shifted to the defendant to satisfy this court why judgment should not be given against him. As Seah FJ (as he then was) said in the same case at p. 302:
> >
> > > If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (see Order 14 rule 3 and 4(i)).
> >
> > On affidavit evidence especially the affidavit of Mr. Awtar Singh in enclosure 27 there was nothing to show that there was a triable issue that would compel me to order a trial.

Incidentally, *Punca Klasik Sdn Bhd v. Seok Kim Leow (supra)* was also reported in another popular law journal, namely, the *Current Law Journal vide* [1996] 4 CLJ 399. Now, without a triable issue there was nothing to compel me to order a trial. Summary judgment should go against the defendant as ordered by the SAR.

Likewise in the present appeal in encl. 43, the defendant having installed the said goods in accordance with the time schedule as set by MWP under the sub-contract and having being partly paid for the works was looking forward to be paid for the balance. Since the "plaintiff has no defence to a claim made in the counterclaim, or to a particular part of such a claim", then the defendant was entitled to apply as they did in encl. 36 "for judgment against the plaintiff on that claim or part" thereof in compliance with O. 14 r. 5(1) of the RHC. In fact, in encl. 36 the defendant applied for summary judgment in regard to the whole of its counterclaim.

On the available evidence, it was part and parcel of my judgment that:

(1) The amount counterclaimed by the defendant was crystal clear and uncluttered.

(2) The MWP provided a clear picture of the whole scenario of the present appeal and that scenario showed that the dark horizontal bars at items 27 and 29 indicated that the defendant only resumed or commenced its works under the sub-contract in the middle of March 1997 and the defendant was requested to complete the works by the middle of October 1997. The targeted and actual percentage of works as set out in the MWP showed the progression of the percentage of the report number 17 to the report number 30. Upon painstaking examination of the reports numbering 17, 18, 19 and extending to number 30, I am constrained to say that if one were to peruse through these reports one would be able to see that the actual percentage of the works performed by the defendant had reached the target of 100%. This was clearly stated to be on October 1997. It was for this reason that the defendant by letter dated 7 October 1997 as reproduced in the early part of this judgment, declared to the plaintiff that the sub-contract works had been completed.

(3) The plaintiff did not raise triable issues nor challenge the contents of the MWP.

(4) The plaintiff had no defence on the merit in regard to the counterclaim.

(5) The plaintiff did not raise any issues to be tried in the context of the counterclaim.

(6) The plaintiff also did not raise any question of law be it in their pleadings or in their affidavits.

(7) The plaintiff has no *bona fide* issue or defence to the counterclaim which ought to be tried.

One prominent feature of the present appeal that stood out like a sore thumb was the fact that the plaintiff did not deny in its affidavit that the defendant had completed the sub-contract works on 7 October 1997. The plaintiff merely emphasised and stressed that the defendant had delayed in completing the sub-contract works and, according to the plaintiff, such delay entitled the plaintiff to claim liquidated and ascertained damages to the tune of RM2,487,456.92. I am of the considered view that even though the plaintiff's claim was far in excess to that of the defendant's counterclaim, that cannot be used as a yardstick to determine the O. 14 application filed by the defendant in regard to their counterclaim. The three letters marked as exhs. "TTH1", "TTH2" and "TTH3" of encl. 40 were all written before the defendant completed the sub-contract works on 7 October 1997 and the sting of those three letters were clearly minimal and of no consequence at all. At any rate, by way of an affidavit in encl. 41, the defendant had categorically explained those three letters away and the plaintiff did not venture to respond at all. It was an exercise in abject silence.

For the reasons adumbrated above, I dismissed the plaintiff's appeal in encl. 43 with costs. Without hesitation, the decision of the learned SAR must be confirmed forthwith. The stay of execution of the O. 14 judgment in the context of the counterclaim was ordered by the learned SAR pending the disposal of the plaintiff's claim and I too confirmed this part of the decision of the learned SAR bearing in mind that under cl. 9 of the sub-contract, the plaintiff was entitled to set-off against any money that was due from the plaintiff to the defendant.